

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 06.11.2009

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THE HONOURABLE MR. JUSTICE M.M.SUNDRESH

W.P.NOS.21369 OF 2000 AND 1781 OF 2001

W.P.NO.21369 OF 2000

The Management
Tamil Nadu State Transport Corporation
(Kumbakonam Division □ I) Ltd
Kumbakonam □ 612 001. .. Petitioner

Versus

1.K.Shahul Hameed

2.The Presiding Officer
Labour Court
Cuddalore. .. Respondents

PRAYER: Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records connected with the Award dated 05.07.2000 passed by the 2nd respondent in I.D.No.326 of 1992 and to quash the same.

For Petitioner : Mr.Ravi

For R-1 : Mr.V.Ajoy Khose

For R-2 : Labour Court

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W.P.NO.1781 OF 2001

K.Shahul Hameed .. Petitioner

Versus

1.The Presiding Officer
Labour Court, Cuddalore.

2.The Management
Tamil Nadu State Transport Corporation
(Kumbakonam Division □ I) Ltd
Kumbakonam □ 612 001. .. Respondents

PRAYER: Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned award passed by the 1st respondent in ID No.326/92 dated 05.07.2000, quash the same in so far as imposing the punishment of stoppage of increment for two years without cumulative effect and reducing the petitioner's backwages and consequently direct the 2nd respondent to reinstate the petitioner with full backwages.

For Petitioner : Mr.V.Ajoy Khose

For R-1 : Labour Court

For R-2 : Mr.Ravi

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C O M M O N O R D E R

In view of the fact that both the writ petitions have been filed challenging the very same award and they have been taken up together for disposal.

2.The petitioner in W.P.No.1781 of 2001 is the driver working with the petitioner in W.P.No.21369 of 2000. A charge memo was issued by the second respondent in W.P.No.1781 of 2001 dated 11.03.1988 on the ground that the petitioner drove the bus in a rash and negligent manner and dashed against the stationed lorry on 10.12.1987. Four charges have been framed against the petitioner pertaining to negligence, damage, loss and causing damage to the reputation of the petitioner. In pursuant to the enquiry, the second respondent has passed an order of dismissal against the petitioner by taking into consideration of the punishment awarded against the petitioner which is inclusive of the conduct of the petitioner involving in instigating the employees to go in a strike.

3.Challenging the said order of dismissal passed by the respondent dated 03.11.1989, the petitioner has approached the Labour Court by raising a dispute. The Labour Court who is the first respondent in W.P.1781 of 2001 has held that charge no.1 pertaining to negligence has been proved and further held that the remaining charges have not been proved. The Labour Court has also found that the punishment awarded by the respondent is totally disproportionate to the charges framed and shocking the conscience of the Court and accordingly by using the power under Section 11(A) of the Industrial Disputes Act has awarded reinstated with 90% of the backwages. The Labour Court has imposed the punishment of withholding of increment for a period of two years without cumulative effect. Challenging the said award, the writ petition has been filed by the Workman in W.P.No.1781 of 2001 and the Management has filed another writ petition in W.P.No.21369 of 2000.

4.As held by the Labour Court, the accident has occurred while the petitioner in W.P.No.1781 of 2001 was the driver of the vehicle. It is not in dispute that the said accident was occurred by dashing against the stationed lorry with the bus driven by the petitioner in W.P.No.1781 of 2001. Therefore, the onus is on the petitioner to prove that the accident has not occurred due to his fault but due to the condition of the vehicle driven by him. Mr.V.Ajoy Khose, learned counsel for the petitioner submitted that the spring pin attached to the bus fell down even before the accident and as a result of the same, the petitioner has lost control resulting in the accident. Therefore, the learned counsel submitted that for the defect in the vehicle caused the accident and the petitioner cannot be found fault with.

5.The said contention of the learned counsel for the petitioner cannot be accepted for the reason that the management witness has clearly stated in the evidence that there was eight feet gap

between the stationed lorry and the road and therefore, the accident has occurred only because the petitioner drove the vehicle very nearer to the stationed lorry. It is also seen that the petitioner has also not given any other evidence in respect of his case, more so when there is no other eyewitness to the occurrence and the lorry was not moving. Therefore, this Court is of the opinion that the finding of fact arrived by the Labour Court on an appreciation of the evidence coupled with the other materials, this Court cannot interfere with the same.

6.The learned counsel for the petitioner Mr.Ravi in W.P.No.21369 of 2000 submitted that the Labour Court has committed an error in not sustaining the order of dismissal based upon other three charges. It is further submitted that inasmuch as the petitioner was reinstated in pursuant to the settlement under Section 18(1) of the Industrial Disputes Act. The petitioner in W.P.No.21369 of 2000 has viewed the negligence seriously coupled with the bus condition and awarded the punishment of dismissal. The said contention of the learned counsel for the petitioner also cannot be accepted. The Labour Court on evidence found that in so far as the charges 3 to 4 are concerned, there is no material to show that the nature of damage and the amount quantified. As rightly observed by the Labour Court, the mere fact that the charge no.1 is proved in itself cannot be a ground to pass an order of dismissal against the petitioner in W.P.No.1781 of 2001 since the charge itself is very frivolous. It is a matter of fact in cases of this nature normally the department enquiry is not conducted and in any case the punishment of dismissal is totally unwarranted and disproportionate to the charges. Even a reading of the charges would show that they are not very serious in nature and hence, this Court is of the opinion that the Labour Court has correctly held that the punishment is disproportionate to the charges and shocking the conscience of the Court. Hence, this Court is of the opinion that no interference is required on merits against the award passed by the first respondent.

7.However, Mr.Ravi learned counsel for the petitioner in W.P.No.21369 of 2000 submitted that in so far as the backwages are concerned, the Labour Court has committed an error in awarding 90% of the backwages. The learned counsel submitted that the duty is cast upon the Labour Court to give a finding as to whether the employee has been gainfully employed from the date of dismissal till the date of the award passed by the Labour Court. Hence, in the absence of such an exercise it is not automatic that the employee is entitled to get the backwages. The learned counsel in support of his contention has relied upon the judgments reported in (2006) 1 SCC 479 [U.P.STATE BRASSWARE CORPN. LTD. v. UDAY NARAIN PANDEY]; (2007) 2 SCC 433 [J.K.SYNTHETICS LTD. v. K.P.AGRAWAL] and (2009) 2 SCC 288 [BALASAHEB DESAI SAHAKARI S.K. LTD. v. KASHINATH GANAPATI KAMBALE].

8.Per contra, Mr.V.Ajoy Khose, learned counsel for the petitioner in W.P.No.1781 of 2001 submitted that the order of dismissal has been passed in view of the fact that the petitioner has been indulging in labour activities against the respondents and that is a reason why the Labour Court has passed the award for reinstate with the backwages. The learned counsel further submitted that inasmuch as the order of punishment being totally disproportionate and the charges being frivolous, the petitioner will have to be given the backwages as awarded by the Labour Court.

9.In the judgment reported in (2006) 1 SCC 479 [U.P.STATE BRASSWARE CORPN. LTD. v. UDAY NARAIN PANDEY]. The Hon'ble Supreme Court was pleased to observe as follows:

[¶61.It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

62. In *Kendriya Vidyalaya Sangathan* this Court held: (SCC p.366, para 16)

"When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard. (See also *Allahabad Jal Sansthan*, SCC para 6.)"

10. Similarly, in the judgment reported in (2007) 2 SCC 433 [*J.K. SYNTHETICS LTD. v. K.P. AGRAWAL*], the Hon'ble Supreme Court was pleased to observe as follows:

[19. But the cases referred to above, where back wages were awarded, related to termination/retranchment which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimisation. The decisions relating to back wages payable on illegal retranchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.

20. But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination."

11. The Hon'ble Apex Court has followed by the subsequent judgment reported in (2009) 2 SCC 288

[BALASAHEB DESAI SAHAKARI S.K. LTD. v. KASHINATH GANAPATI KAMBALE] has held as follows:

¶13.It is now well settled by a catena of decisions of this Court that having regard to the principles contained in Section 106 of the Evidence Act, the burden of proof to show that the workman was not gainfully employed is not on the employer. In this case, the burden of proof had wrongly been placed upon the appellant. This Court in U.P.State Brassware Corpn. Ltd. v. Uday Narain Pandey held: (SCC pp.495-96, paras 61-62)

"¶61.It is not in dispute that the respondent did not raise any plea in his written statement that he was not gainfully employed during the said period. It is now well settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman.

62.In Kendriya Vidyalaya Sangathan this Court held: (SCC p.366, para 16)

"16. ... When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard. (See also Allahabad Jal Sansthan v. Daya Shankar Rai, SCC para 6.)"

14.Furthermore, some materials had been brought on record to show that the respondent was gainfully employed. The evidence adduced on behalf of the appellant in that behalf, in our opinion, had not been considered in its proper perspective. The Industrial Court while holding that no licence is necessary to run a footwear shop in a small town committed a serious illegality in arriving at the finding that the respondent must have been doing so to meet his both ends. It may be correct that a person cannot afford to remain unemployed for a long time but for arriving at a conclusion that the respondent was gainfully employed or not, a large number of factors are required to be taken into consideration."

12.A reading of the above said judgments would show that even in a case where the Labour Court set aside the order of dismissal, the workman concerned is not entitled to get the backwages as a consequent there on. A duty is cast upon the workman to show that he has not been gainfully employed and the Labour Court also will have to go into the said question before awarding the backwages. However, in the present case on hand as observed earlier the punishment is totally disproportionate to the charges shocking the conscience of the Court. The Labour Court has awarded 90% of the backwages to be paid and also passed an order of withholding of increment without cumulative effect for a period of two years. However, in the judgment reported in (2007) 2 SCC 433 [J.K.SYNTHETICS LTD. v. K.P.AGRAWAL] the Apex Court has held that when an inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee and the punishment is disproportionate and excessive then the employee concerned is entitled to get the full backwages. It is to be seen in the present case there is no finding by the Labour Court that the punishment has been given with the sole view to remove the petitioner in W.P.No.1781 of 2001.

13.Considering the above said legal position and applying the said principle to the present case on hand, this Court is of the opinion that in the interest of justice and the backwages awarded by the Labour Court will have to be modified from 90% to 60% over which the counsels appearing for the parties do not have any serious objections. The said order also passed in view of the finding given earlier that the punishment is grossly disproportionate and the misconduct is very small in nature. Hence, the award passed by the Labour Court dated 05.07.2000 in I.D No.326 of 1992 is hereby

modified to the extent that the backwages to be paid to the petitioner in W.P.No.1781 of 2001 is reduced from 90% to 60%, in all respects the same is to continue.

14.The learned counsel for the petitioner Mr.V.Ajoy Khose submitted that the petitioner in W.P.No.21369 of 2000 has already deposited the award amount before the Labour Court and therefore, the petitioner may be permitted to withdraw the said amount in accordance with the order passed by this Hon'ble Court, since the petitioner has already retired from service.

15.Considering the said request, the petitioner in W.P.No.21369 of 2000 is hereby directed to quantify the amount due to the petitioner in W.P.No.1781 of 2001 in accordance with the order passed by this Hon'ble Court and pay the same within a period of two months from the date of receipt of a copy of this order. In case of any dispute regarding the further amount to be paid it is always open to the petitioner in W.P.No.1781 of 2001 to approach the appropriate authority in the manner known to law.

16.With these observations, the writ petitions are disposed of accordingly. No costs.

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To

1.The Management
Tamil Nadu State Transport Corporation
(Kumbakonam Division □ I) Ltd
Kumbakonam □ 612 001.

2.The Presiding Officer
Labour Court
Cuddalore